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CHARLES ELMORE CROPLEY

In the

Supreme Court of the United States

October Term, 1951

No. 392

DIPSON THEATRES, INC.,

Petitioner,

against

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. McFAUL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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November 26, 1951.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

DIPSON THEATRES, INC., *Petitioner,* *against* BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. MCFAUL, *Respondents.*	No. 392

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported in 190 F. (2d) 951. The opinion of the District Court is reported in 86 F. Supp. 716.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

The only question presented by this petition is whether the trial court erred in entering its findings of fact and conclusions of law,[1] unanimously affirmed by the Court of Appeals, that there was not a conspiracy among the defendants to injure the plaintiff in its property or business.

STATUTES INVOLVED

The statutes involved are the Act of July 2, 1890, 26 Stat. 209, and the Act of October 15, 1914, 38 Stat. 730, commonly referred to as the Sherman and Clayton Acts.

STATEMENT

Petitioner seeks this writ, asserting, in effect, that the Court of Appeals has decided "a federal question probably in conflict with applicable decisions of this Court". The petition is based on the theory that the Court of Appeals has misinterpreted and misapplied the decision of this Court in *United States* v. *Paramount Pictures,* 334 U. S. 131. That theory is made possible only by petitioner's complete distortion of the decision of the Court of Appeals.

The complaint herein was filed on September 17, 1946, against eight distributors and three exhibitors of motion pictures. The complaint alleged violations of the anti-trust laws as to four theatre situations in metropolitan Buffalo, New York. An amended complaint was filed which alleged in broad and inclusive terms the existence of an over-all conspiracy in greater

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[1]The opinion of the Court of Appeals and the Findings of Fact and Conclusions of Law of the District Court are printed and bound separately as Appendix A to this brief.

Buffalo in which all eleven defendants participated. On the trial, there was no abatement in the vehemence of plaintiff's claims or in its efforts to prove the existence of a general conspiracy affecting all four of its theatres.

The case proceeded to trial on the theory that plaintiff's four theatres—the Century and Bailey, located in Buffalo, the Ridge, located in Lackawanna, and the Riviera, located in North Tonawanda—had been damaged because of the illegal acts of the eleven named defendants. At the close of the plaintiff's case, the District Court dismissed the cause of action as to Lackawanna against all defendants, and the entire complaint against Columbia Pictures Corporation. Those dismissals have never been alleged as error. The court then proceeded to take the evidence of the remaining defendants. In its final decision the District Court dismissed the action against all defendants as to North Tonawanda and the entire complaint against Universal Film Exchanges, Inc. No error has ever been alleged as to those dismissals. Finally, in its decision, the District Court dismissed the case against all the defendants as to the Century and the Bailey. In the Court of Appeals, appellant abandoned its original claim for loss of profits of a million and a half dollars at the Century and claimed damages for a period of seven months only—from November, 1940, to June, 1941. It has now abandoned that claim, saying "the claim as to the Century is relatively unimportant because it was operated by petitioner only from November 20, 1940 to June 29, 1941, when the lease was surrendered" (Petition, page 4). Petitioner is here only so far as its claim for the Bailey theatre is concerned.

Petitioner's statement of the case is inaccurate in many respects. The facts are fully and accurately stated in the opinion of the Court of Appeals. A summary of those facts shows that Michael Shea was one of the first—if not the first—motion pic-

ture theatre operators in Buffalo. As the demand for theatres increased in Buffalo, Michael Shea in 1925 sold a part interest in his theatre chain to Paramount to obtain financing to build the first-run Buffalo theatre, still the largest in the area. In 1926 Michael Shea acquired the lease of the Kensington theatre and in 1928 the lease of the Bailey theatre. Loew's, operator of the first-run Century theatre, in 1928 turned that theatre over to Michael Shea in return for a part interest in the business. Michael Shea died in 1934 and the defendant McFaul, his successor, Paramount and Loew's, organized the defendant Buffalo Theatres, Inc. (referred to throughout as "Shea") to continue the business.

In 1939 Nikitas Dipson, who controlled or was associated with a large theatre chain, began operations in Buffalo. In that year Shea declined an opportunity to renew its lease on the Century and Bailey. Dipson then acquired both theatres, the first by lease and the latter by purchase of the fee. Of the 67 theatres in Buffalo in 1940, Shea and Dipson each operated 11.

In the admitted absence of direct evidence of the alleged conspiracy, petitioner attempted to prove its existence by circumstantial evidence built around its experiences with the Bailey and Century after it or its predecessors acquired them from Shea. The Bailey had never been a wholly second-run theatre when operated by Shea. The Kensington was originally the only second-run theatre in the neighborhood, but when the Bailey came under the same management as the Kensington, approximately half of the pictures were exhibited in the Bailey on second run. From 1936 on, however, Shea had gradually increased the percentage of second-run pictures at the Kensington. The Bailey became more and more a third-run theatre. It was undisputed that both theatres could not

run day and date and that one had to be preferred over the other.

When Shea surrendered the Bailey lease in 1939, each distributor found itself faced with the necessity of deciding which theatre would receive the prior run of its pictures. Petitioner demanded second run from all the distributors with a seven to twenty-one day clearance over the Kensington. Shea also contended that it was entitled to second run at the Kensington with a twenty-one day clearance over the Bailey. Neither received the treatment it desired from any distributor. Each distributor established its own individual policy with each theatre. Loew's and Paramount licensed the second run to the Kensington with a seven-day clearance over the Bailey. Twentieth Century-Fox licensed the Kensington second run with no clearance. RKO licensed the Kensington second run with seven days clearance. Warner [2] split its product equally between the two theatres on second run. United Artists generally licensed the Kensington second run with a one-day clearance. Universal offered all its product second run to the Bailey with clearance over the Kensington, but petitioner refused to license Universal's product. Columbia licensed all its product second run to the Bailey with clearance over the Kensington.

Petitioner claims that the Bailey theatre after its acquisition by petitioner was demoted from second run to third run as a result of the conspiracy among the defendants and that, as a result, petitioner sustained damages. In the Court of Appeals, however, petitioner conceded that "from January 1, 1936 to August 1, 1939, when Shea operated the Bailey, it played 304 of these films ahead of the Kensington

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[2] Warner Bros. Pictures Distributing Corporation, formerly known and sued as Vitagraph, Inc.

and 225 of them after the Kensington" (page 25, Appellant's brief in the Court of Appeals). From petitioner's own admission, therefore, it is apparent that Shea operated the Bailey as both a second and third run theatre. When petitioner assumed operation of the Bailey it also operated the theatre on second and third run during the entire period of its claim for damages.

The Court of Appeals carefully reviewed all the facts relating to the Bailey, as follows (190 F. (2d) 951, 956):

> "However, the inference of conspiracy might have been sustained if Dipson could have shown that the Bailey was, from the distributor's point of view, clearly a better customer, i.e., capable of producing more revenue, than the Kensington. This he failed to do. There was considerable conflict in the evidence as to which was the better appointed theatre. But, it was uncontroverted that the Kensington was in a growing, the Bailey in a declining, neighborhood. There was also dispute as to which theatre would ordinarily out-gross the other. There, however, is uncontroverted evidence that on the only occasion when the same show ('Pinocchio') played both theatres on the same day, the Kensington out-grossed the Bailey. Warner, which split its product between the Bailey and the Kensington in the years 1939-1943 inclusive received almost twice as much rental from the Kensington as from the Bailey. There was also evidence showing that on the average the Bailey grossed more playing after the Kensington than it did playing comparable pictures second run. This is concededly unusual and was ascribed, apparently with good reason, to Shea's prior advertising which had benefited Dipson in view of the latter's policy not to advertise the Bailey pictures. There was also convincing evidence that the Bailey's gross was being very adversely affected by the activities of the management of the Genesee theatre. The Genesee was much closer to

the Bailey than the Kensington, was of comparable quality, and charged lower admissions. One Basil, who managed and had a half interest in the Bailey, owned the Genesee and in order to favor his wholly owned theatre had violated the agreed clearance and run between it and the Bailey, there being 93 instances of this practice in the year 1940 alone.

"In the light of the foregoing a conspiracy was not established because some of the distributors, when forced to choose between the Bailey and the Kensington, decided that they would gross more at once and in the long run by showing all their pictures at the Kensington first, thus continuing the established trend toward that theatre. In addition, various of the distributor defendants had additional reasons for their choice. Thus Loew, in addition to having an interest in the Kensington, had had unfortunate financial dealings with Dipson in the past. RKO and Fox had had similar experiences, and Warner's experience with Dipson at the Century was not satisfactory. The fact that Dipson, although an experienced exhibitor, was also far more of a dealer in theatres than Shea, was a further factor in the decisions of some distributors to prefer the Kensington."

To simplify the case, the Court of Appeals divided the defendants into four groups: one, the distributors RKO, United Artists and Warner, which neither owned theatres in Buffalo nor had franchise agreements with Shea; two, Twentieth Century-Fox, which had a first and second run franchise agreement with Shea; three, Loew's and Paramount, which, together with the defendant McFaul, owned the stock of Shea and up to 1944 had a first-run franchise agreement with it; and four, Shea and McFaul, the exhibitor defendants.

Concerning the first group, the Court of Appeals said (190 F. (2d) 951, 959):

> "We agree with the trial judge that the first group of defendants—RKO, United and Warner—have not been shown to have been parties to a conspiracy. The mere tabulation of their diverse actions with respect to Shea and Dipson is alone enough to support the decision below since all direct evidence of a conspiracy is lacking. Dipson's allegations in its brief that the actions of these defendants were only taken after clearance with and on sufferance of Shea are entirely unsupported by the record and even had such conspiracy existed no reason for such sufferance is suggested."

Concerning the activities of Twentieth Century-Fox, the court concluded (190 F. (2d) 951, 959):

> "As we have already indicated, the choice of Fox under such circumstances to license its product to Shea for another three years rather than for just one year did not show that it and the two remaining groups of defendants were conspiring to harm Dipson."

And concerning the activities of Loew's and Paramount, the court concluded (190 F. (2d) 951, 960):

> "Had a monopoly been obtained by Shea we might have viewed the question differently but Shea did not have a monopoly of first and second run theatres in Buffalo and Loew and Paramount did not have a monopoly of available films. Shea did not use first run buying power to get second run preference, or vice versa, nor indeed has any such abuse been claimed. Nor did it attempt to exclude Dipson by contracting for more films than it could use. Dipson could and did obtain sufficient films to exhibit at the Century and Bailey (although it did not obtain all it desired). Had a monopoly been the aim of Loew and Paramount, they

> would have caused Shea to retain control of the Century and Bailey. We hold that their activities did not show a joint action that should upset the finding that no conspiracy existed between them."

Concerning the petitioner's own demands, the court said (190 F. (2d) 951, 960):

> "As we have said, had Dipson's demands been acceded to by the distributors it would have secured a monopoly with far less reason to support it than Shea has ever had. There is evidence that Dipson wanted all or nothing from each distributor and testimony from its own witness that its aim was a monopoly."

The foregoing summary can only point up a few of the inaccuracies in petitioner's statement of the facts. Respondents, therefore, adopt by reference the statement of the facts as made by Judge Augustus N. Hand in the unanimous opinion of the Court of Appeals.

ARGUMENT

FIRST: THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION OF THIS COURT IN *UNITED STATES* v. *PARAMOUNT PICTURES*, 334 U. S. 131.

Petitioner's assertion that "unless the decision below is reviewed and reversed this Court's decisions in the *Paramount, Emich* and *Bigelow* cases will have no binding effect in the Second Circuit" (Petition, page 25) is without foundation in law or in fact. There is nothing in the decision of the Court of Appeals for the Second Circuit which in any way

conflicts with any decision of this Court. The opinion of Judge Augustus N. Hand, speaking for the unanimous court, shows that that court gave the fullest consideration to the decision of this Court in the *Paramount* case. Judge Hand said (190 F. (2d) 951, 958):

> "Also the expediting court in the Paramount case specifically held, contrary to Dipson's position, that 'The decision of such controversies as may arise over clearances should be left to local suits in the area concerned'. U. S. v. Paramount Pictures, D. C., 66 F. Supp. 323, 342. The fact that plaintiff now concedes that Columbia and Universal were not parties to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here. There is also no showing that evidence of the Buffalo situation was introduced or relied upon by the government in proving the conspiracy in the Paramount case. Therefore we must look to the record in this case to see if Dipson has shown that the general conspiracy found to exist in the Paramount case, or some other conspiracy, had as one of its objects or effects the monopolization of the first and second run exhibition of pictures in the Buffalo area and that he suffered injury as a result. Of course, the activities revealed in the Paramount case lead us to scrutinize with great care the activities of the same defendants here for where one has violated the Sherman Act in one situation, it might be expected that the same parties would be willing and able to do so elsewhere."

In its petition and on its appeal below, petitioner has assumed that the decision of this Court in the *Paramount* case conclusively settled the question that a local conspiracy existed among the defendants in this case and that citation of that

authority alone justified a reversal by the appellate court below. Stated differently, petitioner claims that the failure of the District Court and the failure of the Court of Appeals to find a conspiracy solely on the strength of the *Paramount* case is reversible error. That is the only reason advanced for the issuance of this writ. Both this Court and the Court of Appeals for the Second Circuit have already passed upon that question adversely to petitioner's position. In *Fifth and Walnut* v. *Loew's Incorporated*, 176 F. (2d) 587 (C. A. 2nd, 1949), *cert. den.* 338 U. S. 894, *rehearing den.* 338 U. S. 940, the court said (p. 590):

> "It is of the essence of plaintiffs' argument that 'but for the fact that a Jury had to pass upon the question of damages,' a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the court. It was not the move-over arrangement itself that was condemned in United States v. Paramount Pictures, Inc., 334 U. S. 131, 159, 160, 68 S. Ct. 915, 92 L. Ed. 1260, but rather the discriminatory fashion in which move-over privileges were accorded by distributors to 'large affiliated and unaffiliated circuits' and not to 'small independent exhibitors.' Plaintiffs make no claim here that they were denied the opportunity to move what first-run pictures they did receive over to the Brown.
>
> "Likewise, the joint operation of the Brown Theatre by one independent exhibitor and a subsidiary of one of the defendants (Loew's) was a type of activity which would not be unlawful unless a conspiracy to monopolize or restrain commerce by means of that

> activity was found by the jury to exist as to some of the defendants in the present action. The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made."

The fallacy of petitioner's position is apparent from its own treatment of the four situations of which it originally complained and concerning which the case was tried. The *Paramount* case, it now contends, required a reversal below as to the Bailey and is the only ground now urged for issuance of the writ. Petitioner did not appeal from the dismissals of Columbia and Universal or appeal from the dismissal as to the Ridge and Riviera theatres or even attempt to maintain its position with respect to the Century. And yet, so far as the *Paramount* case is concerned, all four of petitioner's theatres are in identical positions.

Petitioner's assertion that "the final decision in the *Paramount* case was not rendered until after petitioner's case was tried" (Petition, page 15) is a blind adherence to dates and a play on words. This is demonstrated by petitioner's own chronology (Petition, p. ii). The trial below was begun on September 14, 1948, over five months after the decision of this Court

in the *Paramount* case. The opinion of the trial court was handed down on September 26, 1949, two months after the final decision of the Expediting Court in the *Paramount* case. The Findings of Fact and Conclusions of Law were entered on August 1, 1950, nearly two months after the final affirmance by this Court of the decrees in the *Paramount* case. Petitioner had the full benefit of all the opinions and decisions entered in the *Paramount* case.

SECOND: SINCE THERE WAS NO CONSPIRACY TO INJURE PETITIONER IN ITS PROPERTY OR BUSINESS, THE QUESTION OF DAMAGES CAN NOT ARISE.

Petitioner's misconception of the *Paramount* case is compounded by its complete misunderstanding of *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251. The *Bigelow* case was expressly founded upon a finding by the jury that the defendants had combined and conspired "to maintain a discriminatory system of distribution" (327 U. S. 251, 254). The defendants, though not admitting the conspiracy, did not challenge that finding in this Court. The sole question before this Court in that case was "whether the evidence of damage is sufficient to support the verdict" (p. 254). There was no consideration of conspiracy. If the finding of conspiracy had not been made by the jury there could have been no consideration of the question of damages by this Court in the *Bigelow* case. The *Bigelow* case thus has no conceivable relevance to this petition, since the decision of both courts in this case was expressly based upon a finding that there was no conspiracy among the respondents.

Petitioner is clearly wrong in asserting that "the District Court dismissed an anti-trust suit brought by petitioner upon the ground that the respondents' conduct had not damaged the

petitioner" (Petition, page 2). Petitioner is correct, however, in saying that "the Circuit Court affirmed the dismissal on the ground that the respondents' conduct did not violate the anti-trust laws" (Petition, p. 2). Both decisions below were based upon a clear understanding and a proper application of the anti-trust laws.

The District Court found as a matter of law and as a matter of fact that the respondents acted independently and without concert of action or conspiracy in their dealings with the petitioner's four theatres and with the Shea theatres. The distribution policies of the respondents in Buffalo, Lackawanna and Tonawanda show a complete absence of uniformity of action among them. A schedule of those activities was prepared by the court below and is contained in its opinion at 190 F. (2d) 951, 955, and at page 2088 of the record filed in conjunction with this petition. A correct copy of that schedule is also contained in Appendix A to this brief.[3] It conclusively demonstrates the absence of a conspiracy among the respondents.

Moreover, the District Court entered detailed findings of fact and conclusions of law in which all the evidence was meticulously considered and the law properly applied. Those findings are conclusive upon the question of conspiracy. Findings 58 and 59 read, as follows (Appendix A, pp. 37-38):

---

[3] The respondents have felt compelled to reprint the opinion of the Court of Appeals because of an error, which is assumed to be typographical, in the reprint of the opinion sent up with the petition. Under the heading Lackawanna in petitioner's reprint of the opinion it appears that the respondent Twentieth Century-Fox Film Corporation licensed petitioner second run in Lackawanna whereas the true fact as shown in the official opinion of the court and as shown in the record is that Twentieth Century-Fox licensed petitioner first run in Lackawanna.

"FIFTY-EIGHTH: In licensing its motion pictures for subsequent run exhibition in Buffalo in the Kensington-Bailey area, each of the defendant distributors acted independently, without consultation or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its officers or representatives respecting the theatre or theatres from which it would derive the greatest amount of film license revenue from subsequent run exhibition of its pictures in Buffalo.

"FIFTY-NINTH: The defendant distributors or any two or more of them did not at any time conspire or combine to harm, oppress or deprive the Bailey Theatre or the plaintiff of motion pictures or any particular run of motion pictures, nor did they monopolize or attempt to monopolize the subsequent run exhibition of motion pictures in the Kensington-Bailey area."

Similar findings as to the respondents' conduct with respect to the Century and Lackawanna were made. See Findings 41, 42, 67 and 68. Conclusions of law 2 and 3 read as follows (Appendix A, p. 42):

"2. Plaintiff has failed to establish any violation by the defendants of the Sherman or Clayton Acts as alleged in the amended complaint.

"3. The plaintiff has not been damaged in its business or property by any act or conduct of the defendants."

The findings of the District Court are, unless clearly erroneous, binding upon the appellate courts. Such is the holding of this Court in *United States* v. *Yellow Cab Co.*, 338 U. S. 338. In that case, this Court said (pp. 340-41):

petitioner" (Petition, page 2). Petitioner is correct, however, in saying that "the Circuit Court affirmed the dismissal on the ground that the respondents' conduct did not violate the anti-trust laws" (Petition, p. 2). Both decisions below were based upon a clear understanding and a proper application of the anti-trust laws.

The District Court found as a matter of law and as a matter of fact that the respondents acted independently and without concert of action or conspiracy in their dealings with the petitioner's four theatres and with the Shea theatres. The distribution policies of the respondents in Buffalo, Lackawanna and Tonawanda show a complete absence of uniformity of action among them. A schedule of those activities was prepared by the court below and is contained in its opinion at 190 F. (2d) 951, 955, and at page 2088 of the record filed in conjunction with this petition. A correct copy of that schedule is also contained in Appendix A to this brief.[3] It conclusively demonstrates the absence of a conspiracy among the respondents.

Moreover, the District Court entered detailed findings of fact and conclusions of law in which all the evidence was meticulously considered and the law properly applied. Those findings are conclusive upon the question of conspiracy. Findings 58 and 59 read, as follows (Appendix A, pp. 37-38):

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Similar findings as to the respondents' conduct with respect to the Century and Lackawanna were made. See Findings 41, 42, 67 and 68. Conclusions of law 2 and 3 read as follows (Appendix A, p. 42):

"2. Plaintiff has failed to establish any violation by the defendants of the Sherman or Clayton Acts as alleged in the amended complaint.

"3. The plaintiff has not been damaged in its business or property by any act or conduct of the defendants."

The findings of the District Court are, unless clearly erroneous, binding upon the appellate courts. Such is the holding of this Court in *United States* v. *Yellow Cab Co.*, 338 U. S. 338. In that case, this Court said (pp. 340-41):

> "The Government suggests that the opinion of the trial court 'seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the court.' We see that it did indeed accept defendants' evidence and sustained defendants' view of the facts. But we are unable to discover the slightest justification for the accusation that it did so 'uncritically.' Also, it rejected the inferences the Government drew from its documents, but we find no justification for the statement that it 'ignored' them. The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

The situation before this Court in the *Yellow Cab* case, so far as the findings of the District Court are concerned, is identical with that now before the Court on this petition. Petitioner would have this Court refute the findings of the District Court, try the case *de novo,* and find the facts as petitioner desires them. The findings and conclusions of the District Court, however, are not only amply supported by the record, but are the only credible findings and conclusions that could have been made.

CONCLUSION

A writ of certiorari should not issue to the Court of Appeals for the Second Circuit.

Petitioner has advanced no valid reason why a writ of certiorari should issue to the Court of Appeals for the Second Circuit. In affirming by unanimous decision the judgment below, the Court of Appeals concluded (pp. 960-1):

> "In summary, the plaintiff only alleges a conspiracy with respect to runs and the conduct of the distributor defendants fails to indicate that any such conspiracy existed. Except for Loew and Paramount, all the distributor defendants gave plaintiff the run it desired in some of its theatres where it competed with Shea. Loew and Paramount could legally favor their own theatres and plaintiff was able to obtain sufficient pictures for its theatres.
>
> "In view of the foregoing we find that Judge Knight's conclusion as to the lack of any conspiracy affecting the Bailey and Century was supported by the evidence and must be sustained. As we affirm the decision below on the ground that no illegal conspiracy is shown, it is unnecessary to discuss so much of that opinion as held that conspiracy or not, plaintiff had suffered no damages. Suffice it to say that it appears from the record that there were many reasons given by the appellees which would explain Dipson's lack of financial success even in the absence of conspiracy and would negative any inference of conspiracy that might arise from the existence of unexplained damages or losses. The losses at the Century seem to have been the result of bad management, and at the Bailey seem in a large part due to bad management, unfair competition by the Genesee and a general decline in the neighborhood."

There is nothing in the decision of the Court of Appeals for the Second Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. There is no question of law raised by the petitioner which has not been, but should be, settled by this Court.

Respectfully submitted,

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November 26, 1951.

NOV

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 392

DIPSON THEATRES, INC.,

Petitioner,

against

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, VITAGRAPH, INC., LOEW'S INCORPORATED, PARAMOUNT PICTURES INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION AND VINCENT R. McFAUL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX A TO RESPONDENTS' BRIEF

November 26, 1951.

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 247—October Term, 1950.

(Argued May 9, 1951 Decided July 25, 1951.)

Docket No. 21887

DIPSON THEATRES, INC.,

Plaintiff-Appellant,

—against—

BUFFALO THEATRES, INC., BISON THEATRES CORPORATION, *VITAGRAPH, INC., LOEW'S, INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION and VINCENT R. McFAUL, *WARNER BROS. PICTURES DISTRIBUTING CORP. (formerly Vitagraph, Inc.)

Defendants-Respondents.

Before:

SWAN, AUGUSTUS N. HAND and CLARK,

Circuit Judges.

Appeal from the United States District Court for the Western District of New York.

In an action for treble damages to plaintiff's motion picture exhibition business arising out of an alleged conspiracy among eight motion picture distributors, two corporate exhibitors and the latter's president, to monopolize

the exhibition of first and second run motion pictures in the Buffalo area in violation of the anti-trust laws, plaintiff appeals from so much of the judgment as dismissed the action against six of the distributor defendants and the exhibitor defendants. Affirmed.

BORINS & HOFFMAN, *Attorneys for Appellant;* Robert L. Wright, Louis Borins and Dwight Campbell, Jr., Counsel.

RAICHLE, TUCKER & MOORE, *Attorneys for Appellees Buffalo Theatres, Inc., Loew's Inc. and Paramount Pictures, Inc.;* Frank G. Raichle, C. Stanley Thompson, Louis Phillips and James O. Moore, Jr., Counsel.

SIDNEY B. PFEIFER, *Attorney for Defendants-Appellees RKO Radio Pictures, Inc., and Twentieth Century-Fox Film Corporation;* John F. Caskey and Harry M. Pimstein, Counsel.

O'BRIEN, DRISCOLL, RAFTERY & LAWLER, *Attorneys for Appellee, United Artists Corporation;* Edward C. Raftery and George A. Raftery, Counsel.

O'BRIEN, DRISCOLL, RAFTERY & LAWLER, *Attorneys for Appellee Warner Bros. Pictures Distributing Corporation, formerly called Vitagraph, Inc.;* Edward C. Raftery, George A. Raftery, Robert W. Perkins and Morris Ruffman, Counsel.

BROWN, KELLY, TURNER & SYMONS, *Attorneys for Appellee Vincent R. McFaul;* J. Edmund Kelly and John E. Leach, Counsel.

AUGUSTUS N. HAND, *Circuit Judge:*

This action was originally instituted in 1946 by Dipson Theatres, Inc. (hereinafter called Dipson), against eight national film distributors,[1] hereinafter called Warner, Loew, Paramount, RKO, Fox, Universal, Columbia, and United; Buffalo Theatres, Inc. (hereinafter called Shea), its subsequently dissolved subsidiary Bison Theatres Corporation, and its president, McFaul, for treble damages arising from a violation of the Sherman Anti-Trust Act, 15 U. S. C. § 1 ff. The violation was an alleged conspiracy among all the distributor defendants, Shea and McFaul, to give Shea a monopoly of first and second run exhibition of the distributor defendants' films in Buffalo, New York, and its environs, to the injury of three of Dipson's theatres, the Bailey, the Century and the Ridge, by concertedly refusing to license the above theatres to show motion pictures for the run[2] desired by Dipson and to which Dipson asserts the theatres were entitled by reason of their location and appointments. The case was heard by Knight, *J.*, who dismissed the entire action at the close of the plaintiff's case against Columbia and against all defendants in so far as

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[1]Vitagraph, Inc.,* Loew's, Inc., Paramount Pictures, Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation.

*Warner Bros. Pictures Distributing Corp.

[2]The terms "clearance" and "run" are fully discussed in the *Paramount* case, 334 U. S. 131. Briefly the theatre which is licensed by a distributor to first show a given picture in a given area has the first (and ordinarily most profitable) run, the next theatre licensed to show the picture has the second run, and so on. Clearance is the time in days between the end of one run and the start of the next lower numbered run. It is the general practice in the motion picture industry to set forth the clearance and run in the agreement by which the distributor licenses the exhibitor to show a picture and the clearance and run provided are major factors in determining the film rental to be paid.

it involved the Ridge Theatre. No appeal is taken from this dismissal. This appeal is from the subsequent decision of Knight, *J.*, holding (except in so far as he dismissed the cause of action against Universal) that the plaintiff had failed to prove any conspiracy among the other defendants with respect to the Bailey and Century theatres and in addition that the plaintiff had failed to show any damage to those theatres resulting from defendants' conduct. On appeal Dipson claims as damages operating losses at the Century in the 1940-41 season, and lost profits at the Bailey for the years 1939-1946 inclusive.

The facts are as follows: One Michael Shea was one of the first—if not the first—motion picture theatre operators in Buffalo (1914). He and his successors had always had an excellent reputation for good entertainment and for meeting their obligations to the distributors. As the demand for theatres increased, he, in 1925, sold a part interest in his theatre chain to Paramount's predecessor to obtain financing to build the Buffalo theatre, still the largest in the area. In 1926, Michael Shea acquired by lease the Kensington theatre, and in 1928 the Bailey, both in northeast Buffalo. In 1928 Loew—who operated the Century—turned it over to Michael Shea in return for a part interest in the business. Michael Shea died in 1934 and McFaul, his successor, Paramount and Loew then organized the corporate defendant Shea to continue the business. In 1939 Nikitas Dipson, who controlled or was associated with a large theatre chain, commenced operations in the Buffalo area. Among the theatres that he acquired were three formerly operated by Shea: the Century, a downtown first run theatre, the Bailey, a neighborhood theatre, and the Riviera, a suburban theatre. Shea declined an opportunity to renew his leases and to continue operation of these properties. Dipson also acquired the Ridge, another suburban theatre which had been offered to Shea and refused.

By 1940, after Dipson had entered the area, there were 67 motion picture theatres in Buffalo with an aggregate capacity of 66,684 seats, of which 5 were first run. Shea operated 11 of these, including 3 of the first run theatres with a capacity of 9,979 seats, the remaining 8 being neighborhood theatres with a capacity of 9,040 seats. Three of these Shea neighborhood theatres, the Seneca, Kensington and Elmwood, were operated as second run theatres, that is, Shea showed pictures licensed to it at them before showing the same picture at its 5 other theatres and before the licensors released them to other theatres. Pictures not licensed to Shea for second run appeared in other theatres prior to 1939, and after that time also at the Bailey. The Dipson combine operated 10 neighborhood theatres with a capacity of 11,230 seats, and the first-run Century. There was one independent regular first run theatre, the Lafayette. Of the distributor defendants, only Paramount and Loew had any financial interest in the theatres here involved or in any theatres in the Buffalo area. Prior to Dipson's entry into Buffalo, the 6 percent distributor defendants[3] got ca. 59% of their Buffalo revenue from Shea theatres.

There being admittedly no direct evidence of the alleged conspiracy, plaintiff attempted to prove its existence by circumstantial evidence built around his experiences with the Bailey and Century theatres after he or his predecessors acquired them from Shea. The two theatres will be considered separately.

Bailey.

In 1926 Michael Shea obtained a lease on the Kensington theatre in northeast Buffalo. Two years later he similarly acquired the Bailey in the same general area but some 1.7 miles away. The Bailey was sold to the plaintiff in 1939.

[3]If Columbia is included the figure drops to 56%; the figures for Universal do not appear.

Plaintiff asserted that prior to 1939 it had been a second run theatre[4] but that after plaintiff acquired it, it was demoted to a third run theatre pursuant to a conspiracy among the defendants. He also asserted that the Bailey was a better theatre in every way than the Kensington so that had no conspiracy existed, the distributor defendants would have preferred to exhibit at the Bailey where their film rentals would have been higher. Had plaintiff been able to prove that all the distributor defendants had demoted the Bailey after its sale to plaintiff and that it was a superior theatre to the Kensington, there would have been a justifiable inference that a conspiracy existed as alleged. However, plaintiff was unable to do so. The Bailey had never been a wholly second run theatre but had been given some second and some third runs by Shea of the films licensed to the latter by the various distributor defendants. The Kensington was originally the only second-run theatre in the neighborhood and all the distributor defendants licensed it as such up to 1939. When the Bailey came under the same management, Shea had, with the oral consent of the distributor defendants, originally shown approximately half the pictures he exhibited second run in the neighborhood at the Bailey, and half at the Kensington. From 1936 on he had gradually shown more and more pictures second run at the Kensington so that by 1938, a majority of the product of Warner, United and RKO was showing second run at the Kensington as was a constantly increasing percentage of the product of Fox. It is not disputed that the Kensington and the Bailey were so similar in quality and location that they could not economically play "day and date," *i.e.*, each show the same feature on the same day. In other words, one had to be preferred over the other. So long as they were under common management, no difficulty arose

[4]In Buffalo there was a 30 day clearance between the first and second run.

from this fact, for most of the distributors were evidently content to let Shea determine what order of presentation would result in the greatest gross for them and for him. When they became separately managed, the distributors were forced to decide which they would license first and what clearance they would give. Dipson wanted the entire second run with a 7 to 21 day clearance over the Kensington. Shea argued that the distributors should again implement the clause in the licenses calling for a 21 day clearance in favor of the Kensington but was unable to get this treatment from any distributor. Instead of uniformly choosing the Kensington the distributors acted as follows:

1. Loew licensed the second run to the Kensington with one week clearance over the Bailey.

2. Paramount did the same.

3. Fox, which had a three year franchise agreement with Shea, licensed second run to the Kensington with no clearance over the Bailey.

4. Warner licensed half its pictures to each for second run.

5. Universal offered to license all its pictures for second run to the Bailey. This offer was not accepted by Dipson though it is not shown why it adopted that course.

6. Columbia licensed all its pictures for second run to the Bailey.

7. RKO licensed its pictures for second run to the Kensington with one week clearance over the Bailey.

8. United Artists licensed its pictures individually but generally licensed its pictures for second run to the Kensington first, with one day clearance over the Bailey.

We insert here a table indicating in summary form the actions of the distributor defendants with respect to the Bailey-Kensington and other similar situations in the area:

	BUFFALO				LACKAWANNA		TONAWANDA
			Downtown				
Distributor	Bailey (Dipson)	Kensington (Shea)	Century (Dipson)	3 Shea Theatres	Ridge (Dipson)	Lackawanna (Shea)	Riviera (4) (Dipson)
Paramount	3d run	2d run 7 days clearance		1st run	2d run	1st run	1st run
Loew	3d run	2d run 7 days clearance		1st run	2d run	1st run	1st run
RKO	3d run	2d run 7 days clearance	1st run		1st run	2d run	1st run
Fox	3d run	2d run no clearance		1st run	1st run	2d run	1st run
United	generally 3d run	2d run 1 day clearance	irregularly split among 8 theatres(1)		1st run	2d run	1st run
Warner	½ 2d run	½ 2d run	½ 1st run	½ 1st run	½ 1st run	½ 1st run	(2)
Columbia	2d run	3d run	neither (3)		(2)		(2)
Universal	Offered 2d run		neither (3)		2d run	1st run(5)	(2)

(1) ca. 8½% to the Century, 70% to the 3 Shea theatres.
(2) Not shown.
(3) Lafayette had 1st run.
(4) No Shea Theatre.
(5) 1st run offered Dipson who refused.

In summary, Paramount and Loew licensed Shea first throughout but licensed Dipson where there was no immediately competing Shea theatre; RKO preferred Shea at the Kensington, Dipson elsewhere; Fox licensed Shea first at the Kensington and downtown, Dipson elsewhere; United had no fixed policy but apparently preferred Shea at the Kensington,[5] to some extent downtown and Dipson elsewhere; Warner played no favorites, and Columbia and Universal favored Dipson or the Lafayette, a downtown theatre owned by an independent.

Far from being circumstantial evidence of a conspiracy, the conduct of the distributors tabulated above would appear to be evidence to the contrary. With the exception of Loew and Paramount,[6] who continued to exhibit their own product in theatres in which they had an interest the distributors appear to have taken independent action impelled, if anything, by a desire to favor Dipson who was a far larger exhibitor than Shea in the country as a whole.

However, the inference of conspiracy might have been sustained if Dipson could have shown that the Bailey was, from the distributor's point of view, clearly a better customer, *i.e.*, capable of producing more revenue, than the Kensington. This he failed to do. There was considerable conflict in the evidence as to which was the better appointed theatre. But, it was uncontroverted that the Kensington was in a growing, the Bailey in a declining, neighborhood. There was also dispute as to which theatre would ordinarily out-gross the other. There, however, is uncontroverted evidence that on the only occasion when the same show ("Pinocchio") played both theatres on the same day, the Kensing-

[5]United showed only about one picture a month at the Kensington and Bailey so that its actions were of minimal importance as far as Dipson's supply of film was concerned.

[6]Loew and Paramount in 1934 each signed a 10 year first run franchise agreement with Shea. This was not renewed when it expired in 1944.

ton out-grossed the Bailey. Warner, which split its product between the Bailey and the Kensington in the years 1939-1943 inclusive received almost twice as much rental from the Kensington as from the Bailey. There was also evidence showing that on the average the Bailey grossed more playing after the Kensington than it did playing comparable pictures second run. This is concededly unusual and was ascribed, apparently with good reason, to Shea's prior advertising which had benefited Dipson in view of the latter's policy not to advertise the Bailey pictures. There was also convincing evidence that the Bailey's gross was being very adversely affected by the activities of the management of the Genesee theatre. The Genessee was much closer to the Bailey than the Kensington, was of comparable quality, and charged lower admissions. One Basil, who managed and had a half interest in the Bailey, owned the Genesee and in order to favor his wholly owned theatre had violated the agreed clearance and run between it and the Bailey, there being 93 instances of this practice in the year 1940 alone.

In the light of the foregoing a conspiracy was not established because some of the distributors, when forced to choose between the Bailey and the Kensington, decided that they would gross more at once and in the long run by showing all their pictures at the Kensington first, thus continuing the established trend toward that theatre. In addition, various of the distributor defendants had additional reasons for their choice. Thus Loew, in addition to having an interest in the Kensington, had had unfortunate financial dealings with Dipson in the past. RKO and Fox had had similar experiences, and Warner's experience with Dipson at the Century was not satisfactory. The fact that Dipson, although an experienced exhibitor, was also far more of a dealer in theatres than Shea, was a further factor in the decisions of some distributors to prefer the Kensington.

The Century.

The Century was one of five first run theatres in Buffalo. One of the remaining four[7] was independent, the balance were operated by Shea. (Great Lakes, Buffalo and Hippodrome). The Buffalo and the Great Lakes were the best located and appointed and it had been Shea's policy even when it controlled the Century to play the top pictures at them rather than at the Century. Warner and possibly other distributor defendants also insisted on this. In addition to not being in the center of the downtown theatre district,. the Century was in poor physical condition, and Dipson's successor spent over $50,000 restoring it before it became profitable. Even under Shea management the Century lost money and Shea did not renew its lease when it expired in 1939. Under Dipson management the Century showed first run the pictures of RKO and one-half of Warner; the Lafayette (an independent) showed Columbia and Universal; Shea showed Loew, Paramount, Fox and one-half of Warner, and United showed at all five theatres as well as at certain others, approximately 9% of its product appearing at the Century. Thus Dipson with 20% of the theatres showed the pictures of about 20% of the distributors, and Shea with 60% of the theatres showed the product of somewhat less than 60% of the distributors. It also appears that Dipson actually showed a better grade of pictures at the Century than Shea had. Dipson also lost money on the Century but after it passed into other hands which exhibited the same product as Dipson had it became a profitable property. Dipson surrendered the Century lease in 1941. At that time it blamed its lack of success not on the actions of the defendants but on a nation-wide decline in motion picture attendance.

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[7]Certain other independent theatres occasionally played first runs.

From the above it can be seen that there is no evidence that the distributor defendants combined to deny Dipson access to first run films at the Century. It got some of the product of Warner and United, and all of RKO. Columbia and Universal had never licensed the Century before or after its acquisition by Dipson. Any substantially different pattern of distribution in Dipson's favor would have been an unfair discrimination against Shea or the independent first run exhibitor.

Shea entered into no tie in arrangements, *i.e.*, agreeing to show film first run only if favored in the second, or vice versa, nor did it ever preempt the supply of films by contracting for more films than it could exhibit.

After the above facts had been brought out at the trial, Knight, *J.*, who had had extensive experience in motion picture anti-trust cases, decided that no conspiracy had been shown and that the distributor defendants had merely exercised their independent and individual right to select their own customers.[8] He also held that Dipson had shown no damage resulting from the actions of the defendants. His opinion was subsequently supported by detailed findings. Dipson now asserts that it has met the heavy burden of showing that these findings and conclusions are clearly wrong.[9] On this appeal Dipson seems to have assumed that the decision in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, settled the question that a conspiracy

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[8]"It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor." *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312.

[9]For the extent of this burden see *United States* v. *Yellow Cab Co.*, 338 U. S. 338.

existed among the defendants in this case and that citation of that authority alone justifies a reversal. Hence the majority of its argument is directed at the holding that it had suffered no damage as a result of defendants' conduct. That is not the case. True, the eight distributors who were originally defendants here were defendants there and were there found to have violated the Sherman Act by conspiring to and restraining trade in the exhibition of motion pictures by fixing admission prices, setting unreasonable clearances and runs, and requiring block booking. Joint ownership of theatres was found to facilitate this conspiracy and was, with certain exceptions, enjoined. However, we have already had occasion to pass on the question of whether the *Paramount* case, *supra,* is conclusive of the question of conspiracy among the distributor defendants in a private treble damage action involving a single city. We answered in the negative, and in *Fifth and Walnut* v. *Loew's Incorporated,* 176 F. 2d 587, we said, at 590:

"It is of the essence of plaintiffs' argument that 'but for the fact that a Jury had to pass upon the question of damages,' a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the court. It was not the move-over arrangement itself that was condemned in United States v. Paramount Pictures, Inc., 334 U. S. 131, 159, 160. * * * but rather the discriminatory fashion in which move-over privileges were accorded to distributors * * *

"Likewise, the joint operation of the Brown Theatre by one independent exhibitor and a subsidiary of one of the

defendants (Loew's) was a type of activity which would not be unlawful unless a conspiracy to monopolize or restrain commerce by means of that activity was found by the jury to exist as to some of the defendants in the present action. The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made. * * *"

Also the expediting court in the *Paramount* case specifically held, contrary to Dipson's position, that "the decision of such controversies as may arise over clearances should be left to local suits in the area concerned." 66 F. Supp. 323, 342. The fact that plaintiff now concedes that Columbia and Universal were not parties to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here. There is also no showing that evidence of the Buffalo situation was introduced or relied upon by the government in proving the conspiracy in the *Paramount* case. Therefore we must look to the record in this case to see if Dipson has shown that the general conspiracy found to exist in the *Paramount* case, or some other conspiracy, had as one of its objects or effects the monopolization of the first and second run exhibition of pictures in the Buffalo area and that he suffered injury as a result. Of

course, the activities revealed in the *Paramount* case led us to scrutinize with great care the activities of the same defendants here for where one has violated the Sherman Act in one situation, it might be expected that the same parties would be willing and able to do so elsewhere.

It will simplify matters if the defendants are split into four groups: one, the distributors RKO, United and Warner, who neither owned theatres in Buffalo nor had franchise agreements with Shea; two, Fox, who had a first and second run franchise agreement with Shea; three, Loew and Paramount who not only between them controlled Shea but up to 1944 had a first run franchise agreement with Shea; four, Shea and McFaul, the exhibitor defendants.

In considering evidence of a conspiracy it should be kept in mind that there are a limited number of pictures available for exhibition so that what one exhibitor gets for a given run is necessarily not available to his competitor.[10] A distributor is, therefore, by the very act of distributing pictures, favoring some exhibitors at the expense of others. At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed. Thus there is nothing illegal in the mere fact that Dipson could not get all the pictures it wanted for the runs it wanted. If it had done so it would have been subject to the same sort of legal action it is now maintaining against the defendants.

We agree with the trial judge that the first group of defendants—RKO, United and Warner—have not been shown to have been parties to a conspiracy. The mere

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[10]The process is well summarized in *Westway Theatre* v. *Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 834, *aff'd on opinion below* (4th Cir.), 113 F. 2d 932.

tabulation of their diverse actions with respect to Shea and Dipson is alone enough to support the decision below since all direct evidence of a conspiracy is lacking. Dipson's allegations in its brief that the actions of these defendants were only taken after clearance with and on sufferance of Shea are entirely unsupported by the record and even had such conspiracy existed no reason for such sufferance is suggested.

Fox, as we have indicated, favored Dipson except where it was bound by its first and second run franchise[11] with Shea. Such franchises are not illegal *per se* and the fact that Fox and Shea entered such an agreement in 1937 is not significant. At that time Shea controlled a larger percentage of first and second run theatres than it did after Dipson entered the area and such an agreement was quite logical for both parties. By it, and its franchises with Loew and Paramount, Shea assured itself of a basic supply of pictures and Fox was assured that its product would be exhibited by the best first and second run exhibitor in Buffalo. Dipson was not even on the scene when the franchise agreement was signed. Fox did not blindly follow the lead of Loew and Paramount for it gave Dipson all it could under its agreement with Shea, that is, a run at the Bailey immediately after the Kensington, whereas the others insisted on seven days clearance. Dipson asserts that the conspiracy existed in 1939 and Fox was a party. We are convinced to the contrary. Nor do we think that the renewal of the franchise in 1940 was shown to have been improper. Early in 1940 Nikitas Dipson, the president of Dipson wrote one Samson, Fox's Buffalo representative, asking that Dipson be considered as a Fox first run outlet when Fox's franchise with Shea expired. Samson forwarded this letter to Fox's head office in New York and so

[11]A franchise is a license extending for more than one exhibition season.

informed Dipson. After Nikitas Dipson let the matter drop for three months, he wrote Kent, Fox's president, direct, who, after investigating the matter, replied that a renewal of the franchise had been negotiated some weeks before and that in any event the Shea account had been so satisfactory that Fox would have exhibited in his first run theatres rather than in the Century. We have already shown that the Century was a far less desirable outlet than the Shea theatres. There is no correspondence in the record to show that Dipson ever asked for Fox's second run product. As we have already indicated, the choice of Fox under such circumstances to license its product to Shea for another three years rather than for just one year did not show that it and the two remaining groups of defendants were conspiring to harm Dipson.

After eliminating Fox, RKO, United and Warner, from the alleged conspiracy it remains to determine if there was sufficient evidence to support the decision of Knight, *J.*, that no conspiracy existed between Loew and Paramount on the one hand and Shea and McFaul on the other that the former would exhibit their pictures first and second run solely with the latter. As sufficient to overcome Knight *J's.* decision, Dipson points out that Paramount and Loew each had a double connection with Shea in that each had a large financial interest in it, Paramount since 1925, Loew since 1928; that since Shea's corporate organization in 1934 both had had ten year first run franchise agreements with it (the franchises expired in 1944 and were not renewed); that, although they had no second run franchise with Shea, each of them licensed Shea for second run at the Kensington, rather than Dipson at the Bailey.

As was the case with Fox, the franchises could not have been aimed at Dipson as the latter was not in Buffalo when they were made, but this does not mean that a con-

spiracy could not have originated then to which Dipson later fell victim, or that a conspiracy could not have arisen after Dipson entered Buffalo, although the latter is not even alleged. Shea's failure to retain control of the Century and Bailey in 1939 is support for the finding that no conspiracy existed before that time and franchises executed in 1934 are not evidence of a conspiracy arising in 1939. Officers of both Loew and Paramount testified that it was the policy of each to favor theatres in which they had an interest, all other things being equal. This was to be expected,[12] and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually. As we have already indicated, joint ownership of theatres by distributors is not illegal *per se* though the practice had given rise to sufficient abuse so that it was condemned in the *Paramount* case and both Paramount and Loew have since consented to surrender their interest in Shea.

Had a monopoly been obtained by Shea we might have viewed the question differently but Shea did not have a monopoly of first and second run theatres in Buffalo and Loew and Paramount did not have a monopoly of available films. Shea did not use first run buying power to get second run preference, or vice versa, nor indeed has any such abuse been claimed. Nor did it attempt to exclude Dipson by contracting for more films than it could use. Dipson could and did obtain sufficient films to exhibit at the Century and Bailey (although it did not obtain all it desired). Had a monopoly been the aim of Loew and Paramount, they would have caused Shea to retain control of the Century and Bailey. We hold that their activities

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[12]The consent decree entered into by Paramount in 1940 specifically preserved its right to favor its own theatres.

did not show a joint action that should upset the finding that no conspiracy existed between them.[13]

There is also an inherent lack of plausibility in the complaint as a whole. If the defendants were engaged in a conspiracy to monopolize first and second run exhibitions in Buffalo, why would Shea fail to retain control of the Bailey and the Century in 1939, when it appears that it was offered a chance to buy the Bailey and renew the lease on the Century? If the theatres were as profitable as Dipson would have us believe, Shea would naturally have kept them. Furthermore, the complaint was dismissed as to the defendants Universal and Columbia and in so far as it applied to the Ridge Theatre, and no appeal has been taken from the dismissal. A conspiracy among the six remaining distributor defendants aimed at only two of the plaintiff's many theatres while all but Paramount and Loew favored the plaintiff elsewhere (and even they licensed it in Tonawanda) would seem to have been futile. Such a conspiracy would be entirely different from that shown in the *Paramount* case which apparently favored large combines such as Dipson. Also RKO, United and Warner did not regularly favor Shea even in the two theatres remaining at issue.

Dipson makes much of the fact that it was unable to get the runs it wanted on any terms, but there is no evidence that it offered the distributor defendants better terms than they were getting from Shea, in fact Dipson willingly agreed in 1943 to take all Warner's product third run at the Bailey in return for a reduction in film rental. As we have said, had Dipson's demands been acceded to by the

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[13]Compare the facts in this case with those shown where a conspiracy was found to exist. E.g., *Ball* v. *Paramount Pictures*, 3 Cir., 167 F. 2d 317; *William Goldman Theatres* v. *Loew's, Inc.*, 3 Cir., 150 F. 2d 738, *cert. den.* 338 U. S. 811.

distributors it would have secured a monopoly with far less reason to support it than Shea has ever had. There is evidence that Dipson wanted all or nothing from each distributor and testimony from its own witness that its aim was a monopoly.

In summary, the plaintiff only alleges a conspiracy with respect to runs and the conduct of the distributor defendants fails to indicate that any such conspiracy existed. Except for Loew and Paramount, all the distributor defendants gave plaintiff the run it desired in some of its theatres where it competed with Shea. Loew and Paramount could legally favor their own theatres and plaintiff was able to obtain sufficient pictures for its theatres.

In view of the foregoing we find that Judge Knight's conclusion as to the lack of any conspiracy affecting the Bailey and Century was supported by the evidence and must be sustained. As we affirm the decision below on the ground that no illegal conspiracy is shown, it is unnecessary to discuss so much of that opinion as held that conspiracy or not, plaintiff had suffered no damages. Suffice it to say that it appears from the record that there were many reasons given by the appellees which would explain Dipson's lack of financial success even in the absence of conspiracy and would negative any inference of conspiracy that might arise from the existence of unexplained damages or losses. The losses at the Century seem to have been the result of bad management, and at the Bailey seem in large part due to bad management, unfair competition by the Genesee and a general decline in the neighborhood.

Affirmed.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

DIPSON THEATRES, INC.
Plaintiff

vs.

BUFFALO THEATRES, INC. *et al.*
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial and the court, having heard the evidence, and after due consideration, makes the following Findings of Fact and Conclusions of Law:

FIRST: The plaintiff, Dipson Theatres, Inc. is a corporation organized under the laws of the State of New York in 1939 as D & B Operating Co. Inc., which name was changed in 1940 to Dipson Theatres, Inc. The corporation had an original invested capital of One Hundred Dollars ($100.00), which was never increased.

SECOND: Century Theatrical Enterprises, Inc. (hereinafter called "Century") was a corporation organized under the laws of the State of New York in 1939, with an invested capital of Five Hundred Dollars ($500.00) which was never increased. On December 18, 1941, Century was dissolved.

THIRD: Dipson Realty Co. Inc. is a corporation organized under the laws of the State of New York in 1939 as Dipson-Basil Theatres, Inc., which name was changed in 1940 to Dipson Realty Co. Inc. Dipson Realty Co. Inc. had a nomi-

nal original invested capital which has never been increased. Dipson Realty Co. Inc., Century and the plaintiff were all organized by Nikitas Dipson.

FOURTH: Nikitas Dipson controlled and operated a large number of moving picture theatres in various parts of the United States and was an experienced motion picture operator. Prior to 1939 he had no interests or experience in the motion picture exhibition business in the City of Buffalo or its environs.

FIFTH: The defendant, Buffalo Theatres, Inc. (hereinafter called "Buffalo") is a corporation organized under the laws of the State of New York in 1934 and at all times hereinafter mentioned maintained an agent in the City of Buffalo, New York, and was engaged in the business of exhibiting motion pictures in the City of Buffalo and its environs.

SIXTH: The defendant, Bison Theatres Corporation was a corporation organized under the laws of the State of New York in 1934. It was a wholly owned subsidiary of Buffalo and was engaged in the business of exhibiting motion pictures in the City of Buffalo and its environs. Bison Theatres Corporation was dissolved on April 6, 1940.

SEVENTH: The defendant, Vitagraph, Inc. was a corporation organized under the laws of the State of New York and on or about July 20, 1944, it changed its name to Warner Bros. Pictures Distributing Corporation (hereinafter Vitagraph, Inc. and Warner Bros. Pictures Distributing Corporation will be called "Warner"). At all times hereinafter mentioned, Warner has been engaged in the business of distributing motion pictures throughout the United States.

EIGHTH: The defendants, Loew's Incorporated (hereinafter called "Loew's"), Paramount Pictures, Inc. (hereinafter

called "Paramount") and Twentieth Century-Fox Film Corporation (hereinafter called "Fox") are corporations. Loew's was organized and exists under the laws of the State of Delaware. Paramount and Fox were organized and exist under the laws of the State of New York. At all times hereinafter mentioned, each of these defendants was engaged in the business of producing, distributing and exhibiting, either directly or through subsidiaries, motion pictures throughout the United States and each maintained an exchange or branch office in the City of Buffalo through which it serviced theatres located in Buffalo and other parts of Western New York.

NINTH: The defendants, RKO Radio Pictures, Inc. (hereinafter called "RKO"), Universal Film Exchanges, Inc. (hereinafter called "Universal") and United Artists Corporation (hereinafter called "United Artists") are corporations organized and existing under the laws of the State of Delaware. At all times hereinafter mentioned, each of these defendants was engaged in the business of distributing motion pictures throughout the United States and each of the defendants maintained an exchange or branch office in the City of Buffalo through which it serviced theatres located in Buffalo and other parts of Western New York. The motion pictures distributed by United Artists are produced by independent producers.

TENTH: The defendant, Columbia Pictures Corporation, (hereinafter called "Columbia") is a corporation organized and existing under the laws of the State of New York. At all times hereinafter mentioned, it was engaged in the business of producing and distributing motion pictures throughout the United States and maintained an exchange or branch office in the City of Buffalo through which it serviced theatres located in Buffalo and other parts of Western New York.

ELEVENTH: The defendant, Vincent R. McFaul, has been engaged in the operation of motion picture theatres in Buffalo

and its environs for upwards of thirty-five years. He became president of Buffalo Theatres, Inc. upon its incorporation and at all times hereinafter mentioned has retained that office.

TWELFTH: Marcus Loew Booking Agency, Inc. is a wholly owned subsidiary of Loew's and from October 1940 to the date of the institution of this action, acted as the buyer and booker of motion picture films for the defendant, Buffalo.

THIRTEENTH: Michael Shea, from 1914 until his death in 1934, operated a number of motion picture theatres in Buffalo which are hereinafter referred to as the "Shea theatres". In 1925, Famous Players-Lasky Corporation, a predecessor of Paramount, became financially interested in the Shea theatres. In 1934, Buffalo was organized to take over the management and operation of the Shea theatres.

FOURTEENTH: The capital stock of Buffalo was originally equally divided between Loew's, Paramount and the McNaughton Realty Corporation. In 1935, Vincent R. McFaul acquired 40% of the holdings of the McNaughton Realty Corporation and, in 1944, Loew's and Paramount each bought one-half of the remaining interests of the McNaughton Realty Corporation. From 1944 to the time of the filing of the complaint herein, the stock of Buffalo has been owned by Loew's, Paramount and Vincent R. McFaul.

FIFTEENTH: From the time of its organization up to 1939, Buffalo or its subsidiary, Bison Theatres Corporation, operated the following first-run theatres in downtown Buffalo—Buffalo, Great Lakes, Hippodrome and Century, and the following subsequent run theatres in various communities in and around Buffalo—Seneca, Kensington, Bailey, Elmwood, North Park, Roosevelt, Riviera and Kenmore.

SIXTEENTH: Subsequent to 1939, Buffalo operated three first-run theatres in downtown Buffalo, Buffalo, Great Lakes

and Hippodrome, and eight subsequent run theatres located in and around Buffalo—Seneca, Kensington, Elmwood, North Park, Roosevelt, Kenmore, Niagara and Lackawanna. At this time there were in Buffalo and its immediate suburbs approximately seventy-nine motion picture theatres with an aggregate of 77,312 seats. Buffalo operated 11 theatres with an aggregate of approximately 20,101 seats.

SEVENTEENTH: Subsequent to 1939 there were five first-run theatres in downtown Buffalo of which the defendant, Buffalo operated three—Buffalo, Great Lakes and Hippodrome. The other two first-run theatres, namely, Century Theatre and the Lafayette Theatre were operated by exhibitors who had no affiliation or connection with any of the defendants.

EIGHTEENTH: The Century Theatre is located approximately one and a half blocks from the nearest first-run Shea Theatre. The three first-run Shea Theatres namely, the Buffalo, the Great Lakes and the Hippodrome are all located on Main Street approximately one-quarter of a mile west of the Century Theatre and for many years both prior and subsequent to 1939, the location of these three theatres has constituted the theatre district in the City of Buffalo. The Century is an older theatre than either the Buffalo or the Great Lakes Theatres and its location is substantially inferior for motion picture exhibition purposes to the location of the Buffalo, Great Lakes and Hippodrome Theatres. At all times prior to June, 1941, the equipment and appointments of the Century Theatre were inferior to the equipment and appointments of the Buffalo and Great Lakes Theatres.

NINETEENTH: Prior to 1939, Buffalo operated the Century Theatre under a lease from the owner, Midland Properties, Inc. During the last two years of its operation, Buffalo sustained substantial losses at the Century. On August 1, 1939, Buffalo's lease on the Century Theatre expired. Prior thereto

the owner of the Century Theatre had demanded an increased rental for the theatre as a condition for a renewal of the lease. Buffalo refused to renew the lease at increased terms and on May 1, 1939, the theatre was leased to Century at the increased rental demanded by the owner. Neither Buffalo nor any officer, stockholder or subsidiary thereof made any attempt to hinder or prevent the leasing of the Century Theatre to Century or to any other person or corporation.

TWENTIETH: Prior to 1939, the motion pictures distributed by Loew's, Paramount, Fox, Warner, RKO and United Artists were generally exhibited on first run at the four theatres operated by Buffalo in downtown Buffalo. The better pictures were exhibited at the Buffalo and Great Lakes and the lesser pictures were exhibited at the Hippodrome and Century Theatres. Certain of the defendant distributors insisted that their better pictures be exhibited first-run at the Buffalo or Great Lakes Theatres and it was the experience of Buffalo that the better pictures produced larger grosses when exhibited at the Buffalo or Great Lakes Theatres.

TWENTIETH (A): During the period in controversy, Fox licensed its pictures for exhibition on first and second runs in the City of Buffalo to Buffalo. Such licenses were negotiated solely by the Buffalo branch manager of Fox who acted without consultation, discussion or concert of action with any of the other defendants and in the exercise of his own independent business judgment.

TWENTY-FIRST: Prior to 1939, the motion pictures distributed by Columbia and Universal were generally exhibited on first run in Buffalo at the Lafayette Theatre.

TWENTY-FIRST (A): Subsequent to the acquisition of the Century Theatre by Century, Columbia and Universal continued to license their motion pictures for first run exhibition

in Buffalo at the Lafayette Theatre and refused to license their pictures for first-run exhibition at the Century Theatre because of the satisfactory business relationship which had existed for many years between Columbia, Universal and the Lafayette Theatre.

TWENTY-FIRST (B): During the period of time involved in this action and for many years prior thereto, the Lafayette Theatre was and now is a large, well appointed and well managed theatre, located in the downtown section of the City of Buffalo and was and is in all respects a suitable theatre for the first run exhibition of motion pictures.

TWENTY-SECOND: Subsequent to the acquisition of Century Theatre by Century, there were no changes in established exhibition policies in any of the theatres operated by Buffalo. From time to time Buffalo, as it had in the past, changed its admission prices or playing policies in one or more of its first-run theatres to meet changing economic conditions and public tastes. Except for licensing a reasonable number of feature pictures for exhibition in its first-run theatres, nothing whatsoever was done by Buffalo or any of its officers or stockholders for the purpose or the effect of interfering with or preventing the licensing of any motion pictures for first-run exhibition in the Century Theatre.

TWENTY-THIRD: For the seasons 1939-40 and 1940-41, Buffalo sought to obtain an adequate supply of motion pictures for first-run exhibition at its three downtown theatres. At no time did it contract for more first-run pictures than were reasonably required for the proper operation of the three first-run theatres. Thereafter Marcus Loew sought to obtain an adequate supply of motion pictures for first-run exhibition at Buffalo's three downtown theatres. At no time did it contract for more first-run pictures than were reasonably required for the proper operation of the three first-run theatres.

TWENTY-FOURTH: At all times herein involved, United Artists licensed the feature motion pictures which it distributed individually, picture by picture. Starting with the 1941-42 season, Paramount, Loew's, Warner, Fox and RKO each licensed its feature motion pictures either in small groups, usually of five or less, or individually. Since about June, 1946, each of those distributor defendants has licensed its feature motion pictures individually, picture by picture. Columbia and Universal continued to license their feature motion pictures on a seasonal basis until the date of the institution of this action.

TWENTY-FIFTH: Subsequent to Century's acquisition of the Century Theatre lease in 1939, RKO licensed to Century for first run exhibition at the Century Theatre all of the motion pictures distributed by RKO during the 1939-40 and the 1940-41 seasons, with one exception—a total of 89 out of 90 pictures. This exception was a picture entitled "Pinnochio", a Walt Disney independently produced picture which had been committed to Buffalo for exhibition by RKO previous to Century's acquisition of the Century Theatre lease.

TWENTY-SIXTH: Subsequent to its acquisition of the Century lease, Century entered into contracts with Warner under which 18 of the motion pictures distributed by Warner during each of the 1939-40 and 1940-41 seasons were licensed to Century for first run exhibition at the Century Theatre. The motion pictures so licensed were equal in number and were at least equal in quality to the Warner pictures which had been exhibited at the Century Theatre during the two preceding seasons of Buffalo's operation of the Century.

TWENTY-SEVENTH: During the period of the operation of the Century Theatre by Century, the pictures which Century exhibited at the Century Theatre on first run, were, on the average, superior in quality to the pictures which had been

exhibited at the Century Theatre on first run during the period of its operation by Buffalo.

TWENTY-EIGHTH: From the time Century took over the operation of the Century Theatre to June, 1941, Century was unable to operate the Century Theatre at a profit. The failure to operate at a profit was attributable to a combination of circumstances, including the lack of previous experience of the management in a first run operation in Buffalo; failure of the management properly to exploit its pictures by adequate advertising, promotion and publicity; changes of admission prices; experiments with playing policy and the presentation of stage shows of a burlesque character which were detrimental to the successful operation of a first-run theatre in Buffalo.

TWENTY-NINTH: The Riviera Theatre is located in North Tonawanda, New York, a suburb of Buffalo. Smith Properties, Inc. leased it to Century on or about July 1st, 1939. Smith Properties, Inc. and Midland Properties, Inc., the owner and lessor, of the Century Theatre, were and still are completely different corporate entities, and the lease of the Riviera Theatre to Century was not conditioned, either expressly or impliedly, upon the lease of the Century Theatre to Century.

THIRTIETH: During the period of its operation by Century, the Riviera Theatre exhibited the principal pictures of all of the defendant distributors, upon terms and on runs satisfactory to Century. The operation of the theatre during this period was profitable and no claim is made that any of the defendants hindered or interfered with such operation.

THIRTY-FIRST: On or about June 30, 1941, the directors of Century, at a meeting, referred to a puzzling drop in motion picture theatre attendance throughout the country during the months of April, May and June of 1941, and to the fact that they were unable to operate the Century Theatre at a profit.

At this meeting the directors authorized and directed the officers of Century to surrender its leases on the Century Theatre and the Riviera Theatre. On the same day Century voluntarily surrendered these leases.

THIRTY-SECOND: In voluntarily surrendering its lease of the Century Theatre, Century was motivated in part by the general business conditions prevailing in the motion picture industry and in part by the belief that it would be able to negotiate a new lease with the owners of the theatre at a reduced rental. Subsequent to the surrender of the lease, Century and plaintiff made repeated attempts to negotiate a new lease with the owners of the theatre. The surrender of the leases of the Century and the Riviera Theatres was not occasioned by lack of feature motion pictures for exhibition in these theatres, nor by any act or acts of any of the defendants.

THIRTY-THIRD: Subsequent to the surrender of the lease of the Century Theatre, the operation of the theatre was taken over by the landlord, Midland Properties, Inc., which, after the expenditure of substantial sums of money in physical improvements and advertising, operated the theatre at a substantial profit, exhibiting the motion pictures distributed by RKO and a steadily decreasing number of those distributed by Warner. The motion pictures exhibited in the Century Theatre subsequent to June 30, 1941, were comparable, both in quantity and quality, to the pictures available to Century during the period of its operation of the Century Theatre.

THIRTY-FOURTH: At the time of the voluntary surrender of the lease of the Century Theatre and as part of the consideration therefor, Century assigned all of its assets, with the exception of the office equipment, office improvements and office furnishings, to Midland Properties, Inc., the owners of the Century Theatre.

THIRTY-FIFTH: On November 25, 1941, a meeting of some of the stockholders of Century was held. No notice of said meeting was given to the stockholders and the stockholders of record of 40% of the stock were not represented at the meeting, either in person or by proxy. At such meeting, the stockholders present purported to authorize the officers of Century to transfer all of its remaining assets to the plaintiff corporation in consideration of the plaintiff corporation assuming the obligations of Century and cancelling the debt owed to the plaintiff by Century.

THIRTY-SIXTH: No action was taken by Century or by any of its officers or directors to carry out the purported authorization to transfer its remaining assets to the plaintiff and none of its remaining assets were in fact transferred to the plaintiff. No action was taken by the plaintiff or by any of its officers or directors to accept any purported assignment of any assets of Century, upon such terms. None of the assets of Century were received by the plaintiff, and the plaintiff did not assume the liabilities of Century to cancel the debt owed it by Century.

THIRTY-SEVENTH: Neither at the time Century surrendered its lease on the Century Theatre, nor at the time it purported to dispose of its remaining assets, nor at any other time, did Century or any of its officers, directors or stockholders intend to assign or transfer to the plaintiff any claim or cause of action against the defendants herein or any of them. Century never assigned or transferred to the plaintiff any claim or cause of action against the defendants herein or any of them.

THIRTY-EIGHTH: Neither at the time Century surrendered its lease on the Century Theatre, nor at the time it purported to dispose of its remaining assets, nor at any other time, did the plaintiff or any of its officers, directors or stockholders intend to accept or take any assignment from Century of any claim or cause of action against the defendants herein or any of them.

The plaintiff never accepted or took any assignment from Century of any claim or cause of action against the defendants herein or any of them.

THIRTY-NINTH: In negotiating with each distributor defendant for licenses for the first-run exhibition of motion pictures, neither Buffalo, Marcus Loew or McFaul conditioned the taking of any license for such first-run exhibition upon the distributors' granting a license for the second-run exhibition of the same or any other pictures in any subsequent run theatre or theatres operated by Buffalo, or in any other theatre, for which Marcus Loew was buying and booking pictures.

FORTIETH: Buffalo, Vincent R. McFaul and Marcus Loew did not at any time conspire or combine to harm, oppress or deprive Century Theatre of motion pictures, nor did they monopolize or attempt to monopolize the exhibition of motion pictures at first run in the City of Buffalo.

FORTY-FIRST: In licensing its motion pictures for first run exhibition in Buffalo, each of the defendant distributors acted independently, without consultation or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its officers or representatives respecting the theatre or theatres from which it would derive the greatest possible amount of film license revenue from the first run exhibition of its pictures in Buffalo.

FORTY-SECOND: The defendant distributors, or any two or more of them, did not at any time conspire or combine to harm, oppress or deprive Century Theatre from first run motion pictures, nor did they monopolize or attempt to monopolize, the exhibition of first run pictures in the City of Buffalo.

FORTY-SECOND (A): The defendants have at no time imposed any unreasonable clearance against the plaintiff or any other exhibitors in the Cities of Buffalo, Lockport or Tonawanda for the benefit of any of the other defendants herein.

FORTY-THIRD: Kensington Theatre is located in the City of Buffalo in the center of a business and residential section which has had a continued growth since the opening of the theatre in 1926. Beginning in 1926, the Shea interests leased the theatre and licensed motion pictures for exhibition at the Kensington on a first-run east of Main Street.

FORTY-FOURTH: In 1928, the Shea interests took an assignment of the lease of the Bailey Theatre which is located 1.7 miles south of the Kensington Theatre.

FORTY-FIFTH: By 1936, Buffalo was showing half of the better pictures at the Kensington ahead of the Bailey and half at the Bailey ahead of the Kensington. Thereafter, and in the 1937-1938 season, the management began to show more of the better pictures at the Kensington ahead of the Bailey.

FORTY-SIXTH: Prior to the expiration of the lease of the Bailey Theatre, the owners refused to renew the lease but offered to sell the theatre to Buffalo. Buffalo refused to purchase the theatre at the price demanded and thereafter, it was offered and sold to the plaintiff at that price. Neither Buffalo nor any of its officers, directors or stockholders hindered or in any way interfered with the sale of the Bailey Theatre to the plaintiff.

FORTY-SEVENTH: After the acquisition of the Bailey Theatre by the plaintiff, Buffalo attempted to negotiate contracts with various of the defendant distributors for the exhibition of their pictures at the Kensington Theatre twenty-one days ahead of the Bailey Theatre. None of the defendant dis-

tributors granted the clearance requested. Paramount, Loew's and RKO each licensed its pictures for exhibition at the Kensington Theatre with seven days clearance over the Bailey Theatre. Warner licensed half of its pictures to the plaintiff for exhibition at the Bailey Theatre with a seven days clearance over the Kensington Theatre and the remaining half were licensed to Buffalo for exhibition at the Kensington with a seven days clearance over the Bailey. This division was equal both quality-wise and quantity-wise. Fox licensed its pictures to plaintiff for exhibition at the Bailey Theatre on a run immediately after the Kensington Theatre. United Artists generally licensed its pictures for exhibition at the Kensington Theatre with a one day clearance over the Bailey Theatre. Universal made all its pictures available to the plaintiff for exhibition at the Bailey Theatre ahead of the Kensington Theatre but the plaintiff refused to license such pictures. Columbia licensed all its pictures to the plaintiff for exhibition at the Bailey Theatre. The seven days clearance granted by some of the distributor defendants later was reduced to three days and then to one day.

FORTY-SEVENTH (A): Prior to the plaintiff's acquisition of the Bailey in 1939, RKO exhibited its better pictures and a majority of its pictures at the Kensington ahead of the Bailey and in the 1937-38 and 1938-39 seasons RKO received more money in license fees from the exhibition of its pictures at the Kensington than at the Bailey. In the 1939-40 seasons and thereafter, the Buffalo branch manager of RKO had the sole authority to make the decision, determination and choice for RKO as to the run of its pictures at the Bailey and the Kensington. The decision, determination and choice by RKO's Buffalo branch manager of the Kensington for the exhibition of RKO pictures on a run prior to the Bailey in the 1939-40 season and thereafter were made solely by him, without consultation, discussion or concert of action with any of the other

defendants, were based on good and sufficient business reasons and were made in the exercise of his own independent business judgment.

FORTY-SEVENTH (B): In 1943, the plaintiff agreed to play all of the defendant Warner's pictures one day after the Kensington in consideration of securing from Warner substantial price reductions in film rental. Thereafter, the plaintiff licensed all Warner pictures for exhibition at the Bailey Theatre one day after the Kensington Theatre and secured from Warner substantial price reductions in film rental.

FORTY-SEVENTH (C): During the period in controversy, United Artists furnished an average of one picture per month to the Bailey and Kensington Theatres. The average amount of money which United Artists received per year for the licensing of its motion pictures was $3,082.69 in the Kensington Theatre and $1,993.13 in the Bailey Theatre.

FORTY-EIGHTH: Plaintiff at no time offered to pay higher prices for pictures to any of the distributor defendants for a run at the Bailey ahead of the Kensington Theatre than such distributors were receiving from Buffalo for the pictures exhibited at the Kensington Theatre.

FORTY-NINTH: At all times subsequent to 1929, the Genesee Theatre, owned by the Basil chain, was located on Genesee Street, in the City of Buffalo, approximately one-half mile from the Bailey Theatre and in the same business and residential community. It was comparable to the Bailey Theatre in appointments and was the most immediate competitor of the Bailey Theatre.

FIFTIETH: Beginning in 1939, both the Bailey Theatre and the Genesee Theatre were operated under the same management. Beginning in 1939, the twenty-one day clearance

which was formerly accorded to the Bailey Theatre over the Genesee Theatre by contracts with the various distributors of motion pictures was, with the consent of the plaintiff, reduced to fourteen days and subsequently, in the year 1941, the clearance was reduced to seven days. On over ninety occasions during the year 1940, the plaintiff permitted the Genesee Theatre to play pictures at earlier dates than provided by the clearance provisions of the contracts between the plaintiff and the distributors.

FIFTY-FIRST: During the period of these clearance waivers and changes in contractual clearance permitted by the plaintiff, the admission price at the Genesee Theatre was lower than at the Bailey Theatre and as a result patronage was diverted from the Bailey Theatre to the Genesee Theatre, causing a substantial diminution in the gross receipts of the Bailey Theatre.

FIFTY-SECOND: No basis for comparison exists between the gross receipts of the Bailey Theatre in 1938 and 1940 because of differences in management, advertising and operation, and the impact of the Genesee Theatre clearance violations and changes in contractual clearance on the gross receipts of the Bailey Theatre in 1940.

FIFTY-THIRD: The accepted method in the industry of computing expenses and receipts in the exhibition of motion pictures is the so-called unit system under which a week is divided into ten (10) units of playing time. One unit is assigned to each day of the week except Saturday is counted as two units and Sunday is counted as three units. The gross receipts obtained from the exhibition of a picture is divided by the units of playing time to obtain a unit gross.

FIFTY-FOURTH: The average unit gross received by the plaintiff on 128 pictures played at the Bailey Theatre clear or ahead of the Kensington Theatre was $213.30 per unit and

the average unit gross received by the plaintiff on 127 comparable pictures played at the Bailey Theatre soon after they had been exhibited at the Kensington Theatre was $258.00 per unit.

FIFTY-FIFTH: The average unit gross received by the plaintiff on all pictures played at the Bailey Theatre clear or ahead of the Kensington Theatre was $220.72 and the average unit gross received by the plaintiff on all pictures played at the Bailey Theatre after they had been exhibited at the Kensington Theatre was $230.82.

FIFTY-SIXTH: Buffalo, Vincent R. McFaul and Marcus Loew did not conspire or combine to interfere with or to harm, oppress or deprive the Bailey Theatre, or the plaintiff, of motion pictures, or any particular run of motion pictures, nor did Buffalo , McFaul and Marcus Loew monopolize, or attempt to monopolize, the exhibition of motion pictures on any subsequent run or runs in the City of Buffalo and its environs.

FIFTY-SEVENTH: Subsequent to 1939, Buffalo and Marcus Loew conducted separate negotiations with various of the defendant distributors for licenses for the exhibition of motion pictures at the Kensington Theatre. Separate contracts for such licenses were entered into with various of the defendant distributors and these contracts were not conditioned upon Buffalo or Marcus Loew taking, or a defendant distributor granting, licenses for the exhibition of the same or other pictures in any other theatre or theatres.

FIFTY-EIGHTH: In licensing its motion pictures for subsequent run exhibition in Buffalo in the Kensington-Bailey area, each of the defendant distributors acted independently, without consultation or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its

officers or representatives respecting the theatre or theatres from which it would derive the greatest amount of film license revenue from subsequent run exhibition of its pictures in Buffalo.

FIFTY-NINTH: The defendant distributors or any two or more of them did not at any time conspire or combine to harm, oppress or deprive the Bailey Theatre or the plaintiff of motion pictures or any particular run of motion pictures, nor did they monopolize or attempt to monopolize the subsequent run exhibition of motion pictures in the Kensington-Bailey area.

SIXTIETH: Prior to 1939, there were in Lackawanna, New York, a suburb of Buffalo, four theatre buildings, all of which were owned or leased by two individuals who had no connection with any of the defendants. Early in the summer of 1939, these individuals offered to lease the theatres to Buffalo, but Buffalo declined the proffered leases owing to the physical condition of the theatres and the high rental. Subsequently the four theatre buildings were leased to the plaintiff, and since September 1st, 1939, it has operated the Franklin Theatre and the Ridge Theatre as motion picture theatres in Lackawanna.

SIXTY-FIRST: Prior to the acquisition by the plaintiff of its theatre leases in Lackawanna, an individual, not connected with any of the defendants, had acquired property and prepared plans for the construction of a motion picture theatre in Lackawanna. Buffalo leased this theatre in February of 1940 and thereafter operated it as Shea's Lackawanna Theatre.

SIXTY-SECOND: From 1940 to the time of the commencement of this action, the plaintiff has operated in Lackawanna the Franklin and Ridge Theatres and has exhibited in these theatres on a first run in Lackawanna all of the motion pictures distributed by Fox, RKO, Columbia and United Artists and half of the motion pictures produced by Warner.

SIXTY-SECOND (A): During the season 1939-1940 Universal attempted to license its pictures to the plaintiff for exhibition on first run in Lackawanna, but the plaintiff refused to license said pictures. Thereafter, Universal licensed its pictures to Buffalo for exhibition in the Lackawanna Theatre on first run in Lackawanna.

SIXTY-SECOND (B): During the period in controversy, Fox licensed its pictures for exhibition to the plaintiff exclusively for first run in the City of Lackawanna. At plaintiff's request, Fox also licensed its pictures to the plaintiff exclusively for second run in the City of Lackawanna and Fox did not license its pictures to Buffalo or anyone else in said City of Lackawanna.

SIXTY-THIRD: Beginning 1940 and continuing to the time of the commencement of this action, Buffalo has exhibited in Shea's Lackawanna Theatre on a first run in Lackawanna the motion pictures distributed by Paramount, Loew's, Universal, and half of the motion pictures distributed by Warner.

SIXTY-FOURTH: Since its acquisition of the Lackawanna leases, the plaintiff has at all times had available to it motion pictures adequate in quantity and quality for the profitable operation of the Franklin and Ridge Theatres in Lackawanna. No claim is made by the plaintiff of any damage to its first run theatre in Lackawanna, the Franklin Theatre.

SIXTY-FIFTH: The acquisition of the lease of the Lackawanna Theatre by Buffalo was not occasioned by any attempt upon the part of the defendant, Buffalo, to harm, oppress or deprive the plaintiff of motion pictures or any particular run of motion pictures in Lackawanna and was not a part of any combination or conspiracy to monopolize or to attempt to monopolize the exhibition of motion pictures in Lackawanna. In acquiring the lease of the Lackawanna Theatre, the defendant, Buffalo, acted in accordance with its judgment that the

operation of a new motion picture theatre would prove to be a profitable undertaking and there was no purpose or intent upon the part of Buffalo or any of its officers or stockholders to injure or destroy the business of the plaintiff in Lackawanna.

SIXTY-SIXTH: Buffalo and Marcus Loew conducted separate negotiations with various of the defendant distributors for licenses for the exhibition of motion pictures at the Lackawanna, and these licenses were not conditioned upon Buffalo or Marcus Loew taking, or the defendant distributors granting, licenses for the exhibition of the same or other pictures in any other theatre or theatres.

SIXTY-SEVENTH: In licensing its motion pictures for first run exhibition in Lackawanna, each of the defendant distributors acted independently, without consulting or agreement with any other distributor defendant and without concert of action. Each of the distributor defendants acted in accordance with the business judgment of its officers or representatives respecting the theatre or theatres from which it would derive the greatest amount of film license revenue from the first run exhibition of its pictures in Lackawanna.

SIXTY-EIGHTH: The defendant distributors or any two or more of them did not at any time conspire or combine to harm, oppress or deprive the plaintiff from first run motion pictures in Lackawanna, nor did they monopolize or attempt to monopolize the exhibition of first run pictures in Lackawanna.

SIXTY-NINTH: Both prior and subsequent to 1939 none of the distributor defendants, with the exception of Loew's and Paramount, had any interest either directly or indirectly in the ownership or operation of any motion picture theatre in the Cities of Buffalo, Lackawanna or North Tonawanda.

SEVENTIETH: Both prior and subsequent to 1939 all of the distributor defendants operated under a sales policy through

which each independently selected its own customers in the City of Buffalo and its immediate suburbs.

SEVENTY-FIRST: Both prior and subsequent to 1939 United Artists were engaged solely in the business of distributing motion pictures produced by independent producers. Each picture distributed by United Artists was licensed separately to each individual theatre and was subject to the acceptance or rejection of the representative of the independent producer. There were as many as twenty-one producer representatives and they frequently disapproved the license agreements negotiated by United Artists.

SEVENTY-SECOND: Both prior and subsequent to 1939 United Artists has not distributed a consistent number of motion pictures in any one year and its releases have varied from as few as five or six motion pictures to as many as twenty-one or twenty-two.

SEVENTY-THIRD: Subsequent to 1939 United Artists did not license its pictures for first run exhibition in the City of Buffalo to any one exhibitor and its pictures were exhibited on first run during this period in the following manner:

Name of Theatre	*Number of Pictures Played 1939-1946*
Buffalo	32
Erlanger	1
Great Lakes	47
Hippodrome	48
Lafayette	12
Mercury	1
Teck	5
Century	14

SEVENTY-FOURTH: Subsequent to 1939, Columbia did not regularly license its pictures for exhibition on subsequent run

in any of the theatres operated by Buffalo. Its pictures were regularly exhibited by the plaintiff at the Bailey Theatre on a first run in the Bailey-Kensington area and at the Franklin and Ridge Theatres on a first run in Lackawanna.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action.

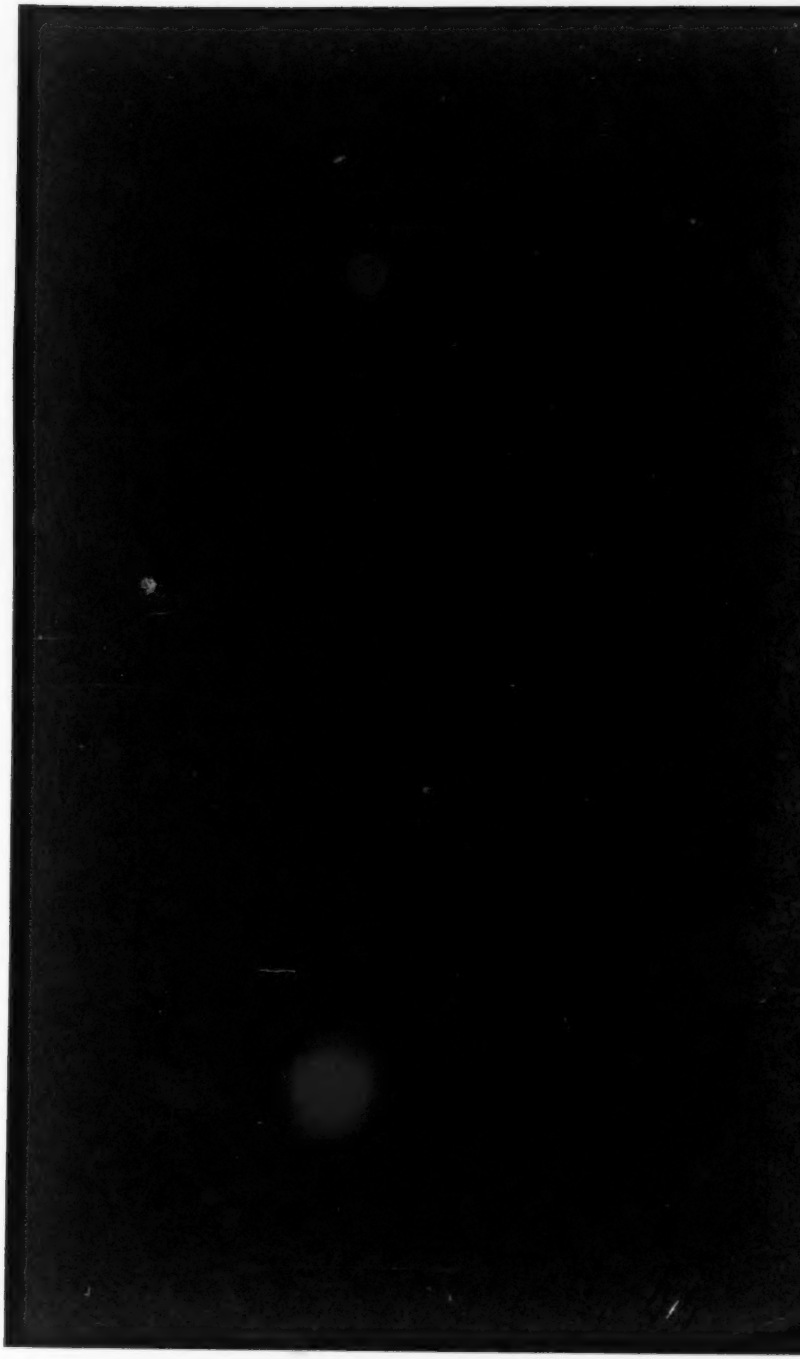
2. Plaintiff has failed to establish any violation by the defendants of the Sherman or Clayton Acts as alleged in the amended complaint.

3. The plaintiff has not been damaged in its business or property by any act or conduct of the defendants.

4. The first, second and third causes of action of the amended complaint must be and are dismissed as to all the defendants and the defendants should have judgment against the plaintiff dismissing said amended complaint together with their costs and disbursements.

Aug. 1, 1950

/s/ JOHN KNIGHT
United States District Judge



In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 392

DIPSON THEATRES, INC., PETITIONER

v.

BUFFALO THEATRES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Government is submitting this memorandum in support of the application for certiorari because it believes that the decision below has seriously misapplied the decision of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, and that correction of this misapplication is in the public interest.

On the original trial in the *Paramount* case, the the district court did not find illegal monopolization

or attempted monopolization, but it held that the defendants had engaged in numerous practices which were in illegal restraint of trade. One of the practices found to be illegal was pooling[1] or joint ownership of theatres by defendants who were both distributors and exhibitors of films. *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 350-352 (S.D. N.Y.). The court ruled that such pooling eliminated competition *pro tanto* both in the exhibition and in the distribution of films, "which would flow almost automatically to the theatres in the earnings of which they have a joint interest", and the court held that pooling, in the circumstances existing in the motion picture industry, constituted a restraint of trade prohibited by the Sherman Act (*id.*, p. 351). Joint ownership of theatres by the exhibitor defendants was held to produce the same results as pooling and to be equally banned by the Act (*ibid.*). The district court therefore entered a judgment which prohibited not only all existing pooling and joint ownerships by exhibitor defendants, irrespective of their particular circumstances, purposes or effects, but also all future pooling and joint ownerships by these defendants. *United States* v. *Paramount Pictures, Inc.*, 70 F. Supp. 53, 75 (S.D. N.Y.).

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[1] Pooling consists of operating as a unit theatres of two or more owners which normally are in competition with each other, and of dividing the profits of the pooled theatres among their owners on some agreed basis.

On appeal, this Court affirmed these judgment provisions. The Court held that the pooling practices "strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 149. The Court also held that prohibition of joint ownership as between exhibitor-distributor defendants was "plainly warranted" (*id.*, p. 151).[2] The Court said that when such defendants have joint interests in the outlets for their films "each in practical effect grants the other a priority for the exhibition of its films", for "the natural gravitation of films is to the theatres in whose earnings the distributors have an interest" (*ibid.*). The Court further stated (*ibid.*):

> Joint ownership between exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act.

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[2] Joint ownership as between a defendant exhibitor and a non-defendant was held to be illegal except in instances where the non-defendant's theatre interests "involve no more than innocent investments by those who are not actual or potential [theatre] operators" (*id.*, p. 153).

In the present case petitioner's claim for damages caused by respondents' violation of the Sherman Act covers the period from 1939, when petitioner acquired certain motion picture theatres in Buffalo, New York, to September 1946, when the complaint was filed. During this period respondent Loew's and respondent Paramount each owned one-third or more of the stock of respondent Buffalo Theatres, Inc. (referred to herein as Shea), which was the leading motion picture exhibitor in Buffalo (Fdgs. 14-16; R. 45-46).[3] Shea operated the Bailey and the Kensington until petitioner purchased the former theatre in 1939 (Fdgs. 15-16, 46; R. 45-46, 55-56). They were neighborhood theatres, and "so similar in quality and location that they could not economically play 'day and date', *i.e.*, each show the same feature on the same day" and "one had to be preferred over the other" (R. 2086).

Petitioner claims that prior to its purchase of the Bailey this theatre had almost always been second run and the Kensington third run as to the better pictures shown in both theatres, but that

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[3] Loew's and Paramount each acquired one-third of Shea's stock on its organization in 1934, and in 1944 each increased its interest in Shea to 43⅓%. During the period 1939-1946, respondent Vincent R. McFaul was president of Shea and had a 13⅓% interest in its stock. (Fdgs. 11, 14; R. 44-45.)

There are five first-run theatres in Buffalo. Until 1939, Shea operated four of them and since then it has operated three of them. Shea also operated, both before and after 1939, some eight subsequent-run theatres. (Fdgs. 15-17; R. 45-46.)

immediately upon petitioner's purchase of the Bailey the playing positions of the two theatres were reversed, with the Bailey demoted to third run and the Kensington promoted to second run. As we point out later (*infra,* pp. 6-7), this claim seems to be conclusively established by documentary evidence.

In the *Paramount* case there was, as previously stated, a blanket condemnation of joint theatre ownership as between exhibitor defendants (two of which were Loew's and Paramount). The Court in effect held that illegality was not dependent upon evidence showing, in particular instances, defendants' motives in entering upon joint ownership, the manner in which they had operated their jointly owned outlets, or the effect of joint ownership in bringing about discrimination by the defendants in the distribution end of their business. The fact that joint ownership gave the defendants a powerful incentive mutually to prefer, in the distribution of their films, the theatres in which they had mutual financial interest, was deemed sufficient to make the restraint a *per se* violation of the Sherman Act.

In direct conflict with this decision, the court below, in the present triple damage action, held that maintenance of a joint theatre venture was legal in the absence of a showing that the joint owners had "conspired to do * * * jointly" precisely what joint ownership impelled them to do—each give

preference in the distribution of its films to the jointly owned theatres (R. 2096). Thus the very aspect of joint ownership which, in the *Paramount* case, led to its condemnation, was viewed, in the present case, as indicative of innocence. The parallel action taken by Loew's and Paramount was regarded by the court below as not evidence of joint action because, as the court said, it "was to be expected" that each would pursue the policy of favoring the "theatres in which they had an interest" (*ibid.*). The court said (*ibid.*):

> Officers of both Loew and Paramount testified that it was the policy of each to favor theatres in which they had an interest, all other things being equal. This was to be expected, and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually. As we have already indicated, joint ownership of theatres by distributors is not illegal *per se* though the practice had given rise to sufficient abuse so that it was condemned in the *Paramount* case and both Paramount and Loew have since consented to surrender their interest in Shea.

The switch in the playing positions of the Bailey and Kensington, coinciding with the change in the ownership of the Bailey, appears to be incontrovertibly established. Schedule XI of Ex. P-136, reproduced in the Appendix to the petition for certiorari, sets forth all pictures shown at both

the Bailey and the Kensington for the years 1936-1941, inclusive (including only the "Top", "First Feature" or "A" pictures of double bills). This schedule shows that, of the picture with greatest drawing power (*i.e.*, those in which the receipts of either theatre were $1,000 or more), approximately 89% were shown first at the *Bailey* in the period prior to petitioner's purchase of the Bailey. Our compilation of such pictures shows the following:

Year	*Number Played First at Bailey*	*Number Played First at Kensington*
1936	42	4
1937	49	6
1938	50	8
1939 (Jan.-April)[4]	18	2
Totals	159	20

After the change in ownership, *all* such pictures were played first at the *Kensington*, both during the balance of the year 1939 and in each of the years 1940 and 1941.

When a "final judgment" of violation of the antitrust laws has been rendered against a defendant in a proceeding brought by the United States under these laws, the judgment is, within certain limitations, *prima facie* evidence in an antitrust

[4] Shea's lease on the Bailey expired at the end of July 1939 (R. 753), but the shift in playing position was made when Shea's president, respondent McFaul, learned of petitioner's purchase of the Bailey at the end of April 1939 (R. 609-10). Since the receipts from both the Bailey and the Kensington went to Shea until the expiration of Shea's lease on the Bailey the immediate shift in playing position would not adversely affect Shea to a material extent.

suit brought against the defendant by any other person. "Congressional reports and debates on the proposal which ultimately became § 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions." *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568. We submit that, in view of the policy of Congress given expression in Section 5, it is in the public interest that this Court grant review where, as here, a decision in private antitrust litigation appears to be in conflict with a decision regarding the same subject matter rendered by this Court in a Government suit under the antitrust laws. In addition, a decision which applies or appears to apply in a triple damage antitrust action a different test of legality than that which this Court applied in a Government antitrust action merits review and determination by this Court.

The significance of the decision below is not limited to the circuit in which it was rendered. There are many pending antitrust actions brought by private claimants against some or all of the *Paramount* case defendants, and a number of these cases involve claims for damages alleged to have resulted from discrimination by the exhibitor-distributor defendants in favor of jointly owned theatres, some of which were also operated under

pooling agreements.[5] A ruling by this Court on the issue presented here as to the meaning and effect of the *Paramount* decision would provide authoritative guidance to the lower federal courts in determining an important issue in these and other like cases, and would serve to promote correct and prompt final disposition of such litigation.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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[5] Among such cases are *Cinema Amusements* v. *Loew's Inc.*, No. 2800, D. Colo.; *Adelman* v. *Paramount Pictures, Inc.*, No. 1109, D. Del.; *Essaness Theatres Corp.* v. *Balaban & Katz Corp.*, No. 49 C 1315, N.D. Ill.; *Lea* v. *Columbia Pictures, Inc., et al.*, No. 3648-50, D. D.C.; *Meiselman* v. *Paramount Film Distributing Corp. et al.*, No. 669, W.D. N.C.; *Tivoli Realty Corp.* v. *Paramount Pictures, Inc.*, No. 1077, D. Del.; *Eagle Lion Classics, Inc.* v. *Loew's, Inc.*, No. 61-166, S.D. N.Y.

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